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ALEXANDER L. STEVAS,
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NO. 82-326

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1982

JOSEPH ALBERT MAHANNA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

JIM SMITH
Attorney General
The Capitol
Tallahassee, Florida 32304

JOY B. SHEARER
Assistant Attorney General
Counsel of Record

MARLYN J. ALTMAN
Assistant Attorney General
111 Georgia Avenue-Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Respondent

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, CONTRARY TO GEDERS V. UNITED STATES, 425 U.S. 80 (1976), WHEN THE TRIAL COURT ORDERED HIM NOT TO CONSULT WITH HIS ATTORNEY DURING A SEVENTEEN (17) HOUR OVERNIGHT RECESS?

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STATEMENT OF THE CASE

Respondent accepts the Petitioner's statement of the case.

ARGUMENT AGAINST GRANTING THE WRIT

I.

THE PETITIONER WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Sometime before 6:00 p.m., while the Petitioner was testifying, defense counsel requested that the jury be excused for a moment so that counsel could discuss an issue out of the hearing of the jury. When the jury was brought back into the courtroom the bailiff presented the judge with a note indicating that one of the jurors wasn't feeling well. Consequently the court decided to recess for the evening and stated the trial would begin the next morning at 11:00 a.m., seventeen hours later.

Thereupon, the trial judge in-

structed that the Petitioner not to discuss his testimony with anyone. Defense counsel was specifically asked if he wanted to discuss anything with his client. Counsel specifically stated that he had no objection to the court's instruction.

Respondent agrees that it was error for the trial judge to instruct defense counsel not to confer with Petitioner during the overnight recess. However, Respondent maintains that in light of the fact that defense counsel specifically stated that he had no objection to the procedure, the error should be deemed harmless. That Petitioner should assert on appeal that he was prejudiced by the court's instruction is an anomaly in view of the fact that counsel announced

he had other matters to attend to (indicating that he had no intention of conferring with his client that evening).

As a general rule, if the accused fails to alert the trial court to claimed error, the issue cannot be raised for the first time on appeal. Unless a party is required to timely object before the trial court, the trial judge and opposing counsel are deprived of an opportunity to take corrective action, if such be required, in order to assure an orderly, fair and proper trial. In sum, a party may not sit idly by at trial watching error being committed, and complain for the first time on appeal. United States v. Hakkard, 603 F.2d 137 (10th Cir. 1979).

In essence, Respondent is asking this Court to decline to adopt a per se rule that any limitation on counsel - petitioner consultation is constitutional error requiring reversal without regard to the harmless error rule. It is Respondent's position that the case at bar is distinguishable from Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976) because in that case petitioner's attorney objected to the improper restraint on his consultation with his client. Sub judice, counsel was asked if he had objection to the procedure and he stated that he did not. Based on the circumstances at bar, Respondent maintains that no prejudice accrued to Petitioner as a result of the error

which should therefore be considered harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Bova v. State, 410 So.2d 1343 (Fla. 1982).

Petitioner asserts that the right to counsel is a personal right that can only be waived by the individual and waiver will not be presumed from a silent record. However, the record sub judice is not silent. Defense counsel stated he had no objection to the overnight procedure. The Petitioner either by himself or through his attorney, expressed no desire for consultation. The next morning however, counsel asked to be allowed to consult with his

client and stated that he was making the request, at the request of his client. The court acceded to the request and granted a short recess (R. 621-623).

The inference is clear on the basis of this incident that had the Petitioner wanted to consult with his attorney, he would have related that desire to the attorney who would have informed the court accordingly.

As Respondent understands it, harmless error occurs when a mistaken ruling, that is, a trial court decision which affects the conduct of the proceedings in some way, is shown not to have affected the final result of the litigation. Sub judice, there is no indication that counsel or Petitioner had any desire to speak to the other

which was precluded by the court's announcement. In a case such as this where a trial court's ruling, however erroneous, has no causative impact on what actually happened or did not happen below, that erroneous ruling cannot reasonably be said to justify a reversal.

CONCLUSION

For these reasons, Respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal, Fourth District, State of Florida, be denied.

Respectfully submitted,

JIM SMITH
Attorney General

JOY B. SHEARER
Assistant Attorney General
Counsel of Record

MARLYN J. ALTMAN
Assistant Attorney General
111 Georgia Avenue-Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 1982, three copies of the foregoing has been furnished, by United States Mail, to H. Dohn Williams, Jr., Esquire, c/o Varon and Stahl, 2432 Hollywood Boulevard, Hollywood, Florida 33020.

_____
JOY B. SHEARER